

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

GOOGLE, INC. \* Civil Docket No.  
\* 2:11-CV-229  
VS. \* Marshall, Texas  
\*  
\* January 23, 2014  
BENEFICIAL INNOVATIONS, INC. \* 10:45 A.M.

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: MS. CHRISTA ANDERSON  
MS. JENNIFER HUBER  
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APPEARANCES CONTINUED ON NEXT PAGE:

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(Proceedings recorded by mechanical stenography,  
transcript produced on CAT system.)

APPEARANCES CONTINUED:

FOR THE DEFENDANT: MS. JULIEN ADAMS  
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MS. ELIZABETH DERIEUX  
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P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

All right. Is the Plaintiff ready to  
read into the record any exhibits used during  
yesterday's portion of the trial from the preadmitted  
exhibit list that have not previously been entered into  
the record?

MS. HUBER: Yes, Your Honor.

THE COURT: Please go to the podium and

1 do so, Counsel.

2 MS. HUBER: Plaintiff's Exhibits 13, 46,  
3 and 88.

4 THE COURT: Any objections from the  
5 Defendant?

6 MR. RAMBIN: No objections, Your Honor.

7 THE COURT: Does the Defendant have a  
8 corresponding list of exhibits to read into the record?

9 MR. RAMBIN: Yes, we do, Your Honor.

10 THE COURT: Please proceed.

11 MR. RAMBIN: Defendant's Exhibits are  
12 508, 509, 510, 511, 512, 520, and 549.

13 THE COURT: Any objection to that  
14 rendition by the -- from the -- from the Plaintiff?

15 MS. HUBER: No, Your Honor.

16 THE COURT: All right. All right. We'll  
17 next move to the formal charge conference. The -- the  
18 Court's previously met with counsel in chambers, after  
19 furnishing them with a working draft of the final jury  
20 instruction and verdict. The Court held a lengthy and  
21 free-flowing discussion with counsel for both sides  
22 regarding any suggested changes or amendments or  
23 deletions to the final instructions and verdict form.

24 The Court's reviewed all the counsel's  
25 comments and arguments and has now generated what the

1 Court believes to be a final set of jury instructions  
2 and verdict form. Counsel has had an opportunity to  
3 review that, and at this time, we'll conduct a formal  
4 charge conference where counsel for each party may make  
5 formal objections to what's before it on the record.

6           So with that, whoever is going to speak  
7 for Plaintiff and whoever is going to speak for  
8 Defendant on this, I'll ask you to both go to the podium  
9 at the same time. That will enhance the efficiency of  
10 the process. And then we'll go through the instructions  
11 and verdict form on a page-by-page basis, and I'll hear  
12 any objections that you might have. So if counsel will  
13 do that at this time.

14           All right. Turning to the final jury  
15 instruction, is there objection from either party to  
16 anything on Page 1 of that document?

17           MS. HUBER: No, Your Honor.

18           MR. ROSEN: No, Your Honor.

19           THE COURT: Page 2?

20           MS. HUBER: No, Your Honor.

21           MR. ROSEN: No, Your Honor.

22           THE COURT: Page 3?

23           MS. HUBER: No, Your Honor.

24           MR. ROSEN: No, Your Honor.

25           THE COURT: Page 4?

1 MS. HUBER: No objections.

2 MR. ROSEN: No, Your Honor.

3 THE COURT: Page 5?

4 MR. ROSEN: Yes, on behalf of the  
5 Defendants.

6 THE COURT: All right. Go ahead,  
7 Mr. Rosen.

8 MR. ROSEN: After the Court gives the  
9 instruction regarding the example of circumstantial  
10 evidence, we believe it's appropriate to provide an  
11 instruction that discusses the power to produce better  
12 evidence. In particular, we proposed: You may consider  
13 the ability of each party to provide evidence. If a  
14 party provided weaker evidence when it could have  
15 provided stronger evidence, you may distrust the weaker  
16 evidence.

17 This is a clear and accurate statement of  
18 the law, and I think it's an issue in this case that the  
19 jury is going to have to decide, particularly with  
20 respect to the issue of whether Google intended to cause  
21 infringement. And, you know, the way I believe it's  
22 going to play out is Google's going to say we don't have  
23 to -- our own people don't have to say they indirectly  
24 infringe or they intended to infringe because we have  
25 circumstantial evidence.

1                   And I believe the jury is entitled to  
2 know that they can disregard weaker evidence when Google  
3 is the sole holder of the strongest evidence on that  
4 issue.

5                   THE COURT: Is there a response from the  
6 Plaintiff?

7                   MS. HUBER: For the record, Your Honor,  
8 we would object to the inclusion of that instruction as  
9 inconsistent with the Court's other instructions  
10 concerning how the jury may consider the evidence.

11                  THE COURT: All right. Well, I'm going  
12 to overrule the request by the Defendant and elect not  
13 to insert the language requested. Counsel, at this  
14 juncture, if I want argument, I'll ask for it.

15                  Primarily, I'm affording you an  
16 opportunity to make your objections on the record, so if  
17 we could limit your comments to the objections  
18 themselves.

19                  MR. ROSEN: I appreciate it.

20                  Your Honor, as part of my objection, may  
21 I state what the instruction we would request is?

22                  THE COURT: I thought you'd already done  
23 that.

24                  MR. ROSEN: I mean, going forward as we  
25 go through the rest of this.

1 THE COURT: Well, I don't want in any way  
2 to limit you from fully stating your objection. I just  
3 don't want to immediately move into argument about why  
4 that's proper or -- or beneficial or why the Court  
5 should do it.

6 MR. ROSEN: Understood.

7 THE COURT: Okay. Anything else on  
8 Page 5, either side?

9 MR. ROSEN: No, Your Honor.

10 MS. HUBER: No, Your Honor.

11 THE COURT: Page 6?

12 MS. HUBER: No objections.

13 MR. ROSEN: No, Your Honor.

14 THE COURT: Page 7?

15 MS. HUBER: No objections.

16 MR. ROSEN: No, Your Honor.

17 THE COURT: Page 8?

18 MR. ROSEN: Yes, on behalf of Defendants.

19 THE COURT: All right.

20 MR. ROSEN: All right. There are two  
21 things on Page 8. First of all, we believe the -- with  
22 respect to the instruction on nominal damages that --  
23 where the Court says, but also that Google was not  
24 harmed by Beneficial's conduct, that should be stricken.

25 And at the end of that sentence, the

1 Court should include an instruction that states:  
2 However, to award nominal damages, you must first  
3 conclude that Google has made a showing that it was  
4 actually harmed by Beneficial's breach.

5 THE COURT: All right. Response from the  
6 Plaintiff?

7 MS. HUBER: Your Honor, we would object  
8 to that proposed revision to the Court's instruction.

9 THE COURT: Well, the objection is  
10 sustained and the requested addition is overruled.

11 What's your second item on this page?

12 MR. ROSEN: The second item on this page  
13 is at -- at the end of that sentence regarding nominal  
14 damages, we would propose that the Court include an  
15 instruction that says: Google's filing of this lawsuit  
16 cannot be considered as harm to Google and cannot be the  
17 basis for an award of actual damages or nominal damages.

18 THE COURT: Plaintiff have a response?

19 MS. HUBER: Your Honor, we would object  
20 to the inclusion of that statement.

21 THE COURT: Okay. The Court elects not  
22 to include that statement and overrules Defendant's  
23 request that it be included.

24 Anything further, Counsel, on Page 8?

25 MR. ROSEN: No, Your Honor.

1 THE COURT: Anything on Page 9?

2 MR. ROSEN: No, Your Honor.

3 MS. HUBER: No objections.

4 THE COURT: Page 10?

5 MR. ROSEN: No, Your Honor.

6 MS. HUBER: No objection.

7 THE COURT: Page 11?

8 MR. ROSEN: No, Your Honor.

9 MS. HUBER: No objections.

10 THE COURT: Page 12.

11 MR. ROSEN: Nothing, Your Honor.

12 MS. HUBER: Your Honor, I believe that on  
13 Page 12 begins the instructions for direct infringement.

14 Plaintiff would object to those  
15 instructions as inconsistent with the language of the  
16 contract and inconsistent with -- with Google's position  
17 that direct infringement can be established by  
18 Beneficial's own claims against Google's customers.

19 THE COURT: Response from the Defendant?

20 MR. ROSEN: Defendants would object to  
21 the elimination of that instruction.

22 THE COURT: All right. Well, the -- the  
23 objection is sustained, and the request for inclusion by  
24 the Plaintiff is overruled.

25 Anything else on Page 12?

1 MR. ROSEN: No, Your Honor.

2 MS. HUBER: Your Honor, I believe also --  
3 also related to the direct infringement instruction,  
4 Google would request that if the Court does give a  
5 direct infringement instruction, we would -- excuse  
6 me -- if the Court does give a direct infringement  
7 instruction, we would object to the absence of a  
8 statement that direct infringement can be proven by  
9 circumstantial evidence, which is particularly  
10 appropriate in this case based upon the language of the  
11 contract.

12 THE COURT: All right. Well, the Court's  
13 included an instruction on circumstantial evidence in  
14 these final instructions and has made it clear in that  
15 instruction that circumstantial evidence, if produced,  
16 is adequate to prove any fact on that basis. I'll  
17 overrule your request.

18 All right. Moving to Page 13, are there  
19 any objections from either party?

20 MR. ROSEN: Page 13, yes, Your Honor, on  
21 behalf of Defendants.

22 THE COURT: All right.

23 MR. ROSEN: At the conclusion of the  
24 direct infringement instruction, we would request that  
25 the Court add that the mere filing of the complaint by

1 Google (sic) and the provision of infringement  
2 contentions does not constitute evidence that the Google  
3 customers actually do directly infringe any claim of the  
4 Beneficial patents; rather, you must determine from the  
5 evidence presented to you during this trial whether  
6 Google has proven by a preponderance of the evidence  
7 that the Google customers actually did directly infringe  
8 any of the claims of the Beneficial patents, not just  
9 whether they -- they were at some point alleged to have  
10 infringed.

11 THE COURT: What's the Plaintiff's  
12 response to that request from the Defendant?

13 MS. HUBER: We object to that request.

14 THE COURT: Well, the Court is going to  
15 overrule the Defendant's request to add that additional  
16 instruction, accordingly, grant the Plaintiff's  
17 objection.

18 Anything else on 13?

19 MR. ROSEN: I just want to -- just to  
20 clear up the record, I think when I stated what we  
21 wanted to include, I said the filing of the complaint by  
22 Google. I meant to say the filing of the complaint by  
23 Beneficial. So I just wanted to correct that.

24 THE COURT: All right. Then let's go on  
25 to Page 14. Any objection from either party on Page 14

1 of the instructions?

2 MR. ROSEN: Nothing, Your Honor.

3 MS. HUBER: No, Your Honor.

4 THE COURT: Page 15.

5 MR. ROSEN: Yes, on behalf of Defendants.

6 THE COURT: All right. State your

7 objection.

8 MR. ROSEN: At -- at the end of the  
9 elements of the contributory infringement, we believe  
10 the Court should include an instruction that  
11 non-infringing uses are substantial when they are not  
12 unusual, farfetched, elusory, impractical, occasional,  
13 variant, or experimental.

14 THE COURT: Response?

15 MS. HUBER: Your Honor, we would object  
16 to the -- the inclusion of that language.

17 THE COURT: The Court finds that that's  
18 not necessary.

19 The Court also has compared this  
20 provision with the model generated by the Federal  
21 Circuit Bar Association, and that additional instruction  
22 is not included.

23 Accordingly, I'm going to overrule  
24 Defendant's request that that be included at this  
25 portion of the instruction.

1 All right. Anything else on Page 15?

2 MR. ROSEN: No, Your Honor.

3 MS. HUBER: No, Your Honor.

4 THE COURT: Let's turn to Page 16. Any  
5 objections from either party there?

6 MR. ROSEN: No, Your Honor.

7 MS. HUBER: No objections.

8 THE COURT: Page 17.

9 MR. ROSEN: No, Your Honor.

10 MS. HUBER: No objections.

11 THE COURT: Page 17 is the final page of  
12 the final jury instructions.

13 Turning to the proposed verdict form, are  
14 there any objections from either party as to any portion  
15 of the proposed verdict form?

16 MS. HUBER: No objections from Plaintiff,  
17 Your Honor.

18 MR. ROSEN: No objections.

19 THE COURT: All right. Then that  
20 concludes the formal charge conference.

21 We'll stand in recess for a few moments  
22 while I reproduce the requisite number of copies for the  
23 jury. Then as soon as possible, I'll be back in Court,  
24 we'll bring in the jury, give them the charge, and  
25 proceed with closing arguments.

1 I've discussed closing arguments with  
2 counsel in chambers. For the Plaintiff, Ms. Anderson,  
3 you're going to present the closing; is that correct?

4 MS. ANDERSON: Yes, Your Honor.

5 THE COURT: Are you going to present both  
6 -- both portions of the Plaintiff's closing?

7 MS. ANDERSON: Yes, Your Honor.

8 THE COURT: All right. And for the  
9 Defendant, Mr. Adams?

10 MR. ADAMS: Yes, Your Honor.

11 THE COURT: Okay. Counsel presenting  
12 closing arguments, if you want a warning as to your  
13 time, just simply ask for it when you go to the podium.

14 All right. With that, we stand in  
15 recess.

16 COURT SECURITY OFFICER: All rise.

17 (Recess.)

18 (Jury out.)

19 COURT SECURITY OFFICER: All rise.

20 THE COURT: Be seated, please.

21 All right. Mr. McAteer, would you bring  
22 in the jury, please?

23 COURT SECURITY OFFICER: Yes, sir.

24 All rise for the jury.

25 (Jury in.)

1 THE COURT: Be seated, please.

2 Ladies and Gentlemen of the Jury, you  
3 have now heard the evidence in this case. I will now  
4 instruct you on the law that you must apply to that  
5 evidence. Each of you are going to receive a copy of  
6 these instructions in written form that I'm giving you  
7 now orally. So unless you particularly want to, there's  
8 no reason for you to make notes at this time. You'll  
9 have a copy to refer to later.

10 It's your duty to follow the law as I  
11 give it to you. However, you are the sole judges of the  
12 facts. Accordingly, do not consider any statement that  
13 I have made during the trial or that I make in these  
14 instructions as an indication that I have any opinion  
15 about the facts in this case.

16 After I give you these instructions, the  
17 attorneys will make their closing arguments. States --  
18 statements and arguments of the attorneys are not  
19 evidence and are not instructions on the law. They are  
20 intended only to assist you in understanding the  
21 evidence and the parties' contentions.

22 A verdict form has been prepared for you,  
23 and you will take that verdict form with your copies of  
24 the instructions into the jury room. And when you've  
25 reached a unanimous agreement as to your verdict, you

1 will have your foreperson fill in the blanks on that  
2 form, date it, and sign it.

3           Answer each question in the verdict form  
4 from the facts as you find them to be. Do not decide  
5 who you think should win and then answer the questions  
6 to reach that result. Your answers and your verdict  
7 must be unanimous.

8           In determining whether any fact has been  
9 proved in this case, you may, unless otherwise  
10 instructed, consider the testimony of all witnesses,  
11 regardless of who may have called them, and all the  
12 exhibits received into evidence, regardless of who may  
13 have produced them. You may also consider any  
14 stipulations received into evidence.

15           By the Court allowing testimony or other  
16 evidence to be introduced over the objection of an  
17 attorney, the Court did not indicate an opinion as to  
18 the weight or effect of such evidence. As I've stated  
19 before, you are the sole judges of the credibility of  
20 all the witnesses and the weight and effect, if any, to  
21 be given to all the evidence.

22           When the Court sustained an objection to  
23 a question addressed to a witness, you must disregard  
24 the question entirely, and you may draw no inference or  
25 speculate from the wording about what the witness would

1 have said, if he or she had been permitted to answer the  
2 question.

3           At times during the trial, it was  
4 necessary for the Court to talk to the lawyers at the  
5 bench out of your hearing or by calling a recess. We  
6 met because often during a trial, things come up that do  
7 not concern the jury. You must not speculate about what  
8 was said during such discussions outside of your  
9 presence.

10           While you should consider only the  
11 evidence in this case, you are permitted to draw such  
12 reasonable inferences from the testimony and exhibits as  
13 you feel are justified in the light of common  
14 experience. In other words, ladies and gentlemen, you  
15 may make deductions and reach conclusions that reason  
16 and common sense lead you to draw from the facts that  
17 have been established by the testimony and evidence in  
18 this case.

19           You are the sole judges of the  
20 credibility or believability of each witness and the  
21 weight to be given to each witness' testimony. An  
22 important part of your job will be making judgments  
23 about the testimony of the witnesses who testified in  
24 this case. You should decide whether you believe all or  
25 any part of what each witness had to say and how

1 important that testimony was.

2           In determining the weight to be given to  
3 the testimony of a witness, you should ask yourself  
4 whether there was evidence tending to prove that the  
5 witness testified falsely concerning some important fact  
6 or whether there was evidence that at some other time,  
7 the witness said or did something or failed to say or do  
8 something that was different from the testimony the  
9 witness gave before you during the trial.

10           The testimony of a single witness may be  
11 sufficient to prove any fact, even if a greater number  
12 of witnesses have testified to the contrary if, after  
13 considering all of the evidence, you believe that single  
14 witness.

15           In making that suggestion -- excuse me --  
16 in making that decision, I suggest that you ask  
17 yourselves a few questions.

18           Did the person impress you as being  
19 honest?

20           Did the witness have any particular  
21 reason not to tell the truth?

22           Did the witness have a personal interest  
23 in the outcome of the case?

24           Did the witness have any relationship  
25 with either the Plaintiff or the Defendant?

1                   Did the witness seem to have a good  
2 memory?

3                   Did the witness clearly see and hear the  
4 things about which he or she testified?

5                   And did the witness have the ability to  
6 understand the questions clearly and answer them  
7 directly?

8                   Did the witness' testimony differ from  
9 the testimony of other witnesses?

10                  These are just a few of the  
11 considerations that will help you determine the accuracy  
12 of each witness and what they said.

13                  You should keep in mind, of course, that  
14 a simple mistake by a witness does not necessarily mean  
15 that the witness was not telling the truth as he or she  
16 remembers it, because people may forget things from time  
17 to time or remember things inaccurately. So if a  
18 witness has made a misstatement, you need to consider  
19 whether that misstatement was an intentional falsehood  
20 or simply an innocent lapse of memory, and the  
21 significance of that may depend on whether it had to do  
22 with an important fact or only an unimportant detail.

23                  Certain testimony in this case has been  
24 presented to you through depositions. A deposition is  
25 the sworn, recorded answers to questions from the

1 witness in advance of the trial. If a witness cannot be  
2 present to testify in person from the witness stand, the  
3 witness' testimony may be presented under oath in the  
4 form of a deposition.

5               Before this trial, attorneys representing  
6 the parties in this case questioned these deposition  
7 witnesses under oath. A court reporter was present and  
8 recorded the testimony. Deposition testimony is  
9 entitled to the same consideration as testimony given by  
10 a witness from the witness stand.

11              Accordingly, you should judge the  
12 credibility and the weight -- you should judge the  
13 credibility of and weigh the importance of deposition  
14 testimony to the best of your ability just as if the  
15 witness had testified before you in person in court.

16              Evidence was presented to you in the form  
17 of answers to one of the party's written interrogatories  
18 submitted by the other side. These answers were given  
19 in writing and under oath before the actual trial in  
20 response to questions that were submitted in writing  
21 under established court procedures. You should consider  
22 the answers insofar as possible in the same way as if  
23 they were made from the witness stand.

24              Before each trial -- before this trial,  
25 rather, each party had the right to ask another party to

1 admit in writing that certain matters are true through  
2 what are called requests for admissions. If the other  
3 party admits those matters, you must accept them as  
4 true. No further evidence is required to prove them.

5           There are two types of evidence that you  
6 may consider in properly finding the truth as to the  
7 facts in this case. One is direct evidence, such as the  
8 testimony of an eyewitness. The other is indirect or  
9 circumstantial evidence; that is, the proof of a chain  
10 of circumstances that indicates the existence or  
11 non-existence of certain other facts.

12           As a general rule, the law makes no  
13 distinction between direct or circumstantial evidence  
14 but simply requires that you find the facts based on the  
15 evidence presented, both direct and circumstantial.

16           By way of example, if you wake up in the  
17 morning and see that the sidewalk is wet, you may find  
18 from that fact that it rained during the night.

19           However, other evidence, such as a turned  
20 on water hose, may provide a different explanation for  
21 the presence of the water on the sidewalk.

22           Therefore, before you decide that a fact  
23 has been proved by circumstantial evidence, you must  
24 consider all the evidence in the light of reason,  
25 experience, and common sense.

1                   When knowledge of a technical subject may  
2 be helpful to the jury, a person who has special  
3 training or experience in that technical field called an  
4 expert witness is permitted to state his or her opinion  
5 of those technical matters.

6                   However, you are not required to accept  
7 that opinion. As with any other witness, it is solely  
8 up to you to decide whether to rely on it or not.

9                   There is one standard of proof that you  
10 should apply in this case. As I mentioned at the  
11 beginning of the trial, preponderance of the evidence  
12 means evidence that persuades you that a claim is more  
13 likely true than not true.

14                   In determining whether any fact has been  
15 proved, you may, unless otherwise instructed, consider  
16 the stipulations, the testimony of all the witnesses  
17 regardless of who called them, and all exhibits received  
18 into evidence regardless of who may have produced them.

19                   As I did at the start of the case, I'll  
20 first give you a summary of each side's contentions in  
21 this case. I'll then provide you with detailed  
22 instructions on what each side must prove to win on each  
23 of its contentions.

24                   The Plaintiff in this case, Google,  
25 Inc. -- the Plaintiff in this case is Google, Inc. The

1 Defendant in this case is Beneficial Innovations, Inc.  
2 Google's claim against Beneficial is for breach of a  
3 contract. In -- in 2010, Google and Beneficial entered  
4 into a settlement agreement that gave Google and its  
5 customers licenses to Patents No. 6,712,702 called the  
6 '702 patent, and Patent 7,496,943 called the '943  
7 patent, collectively called the asserted patents in  
8 exchange for the payment of money by Google to  
9 Beneficial.

10 In 2011, Google (sic) sued a number of  
11 companies alleging infringement of the '702 and the '943  
12 patents, and some of those companies were customers of  
13 Google.

14 Google intervened to become a party to  
15 that lawsuit and has alleged that Beneficial breached  
16 the settlement agreement by bringing a patent  
17 infringement lawsuit against these Google customers  
18 using Google advertising products and services when that  
19 use was licensed under the settlement agreement.

20 Google contends that Beneficial's claims  
21 of infringement against these Google customers, based  
22 upon their use of Google products and services violated  
23 the licenses that Google paid for pursuant to the  
24 settlement agreement.

25 Beneficial Innovations, which I'll simply

1 call Beneficial, denies that it breached the settlement  
2 agreement with Google. Specifically, Beneficial denies  
3 that the Google customers are licensed to use the  
4 patents.

5           The settlement agreement only creates a  
6 license for Google customers if certain conditions are  
7 met, and it is Beneficial's position that the conditions  
8 necessary to create a license for Google's customers are  
9 not met.

10           To fulfill your duty as jurors, you must  
11 decide whether Google (sic) has breached the settlement  
12 agreement, and if so, whether that breach caused damages  
13 to Google.

14           To assist you in your duty as jurors, the  
15 parties have stipulated to the following facts. This  
16 means that both sides agree that these are facts. You  
17 must, therefore, treat these facts as having been  
18 proven.

19           (1) Beneficial, Inc. is a Nevada  
20 corporation with its principal place of business in  
21 Las Vegas, Nevada.

22           (2) Google, Inc. is a Delaware  
23 corporation with its principal place of business in  
24 Mountain View, California.

25           (3) On December the 20th, 2007,

1 Beneficial sued Google and others in the United States  
2 District Court for the Eastern District of Texas in an  
3 action titled Beneficial Innovations, Inc., versus AOL,  
4 LLC, et al, called the AOL case.

5               Next, on June the 1st, 2009, Beneficial  
6 sued Google and others in the United States District  
7 Court for the Eastern District of Texas in an action  
8 titled Beneficial Innovations versus CareerBuilder, LLC,  
9 and others, which is called the CareerBuilder case.

10              Next, Google and Beneficial entered into  
11 a contract, which shall be referred to as the settlement  
12 agreement, effective November 2nd, 2010, resolving the  
13 AOL and CareerBuilder cases.

14              Next, as part of the settlement  
15 agreement, Beneficial granted Google a license to the  
16 entire Beneficial patent portfolio, including the '702  
17 and the '943 patents.

18              Next, also as a part of the settlement  
19 agreement, Google paid Beneficial financial  
20 consideration as specified in that agreement.

21              Next, DoubleClick, Inc., was acquired by  
22 Google in March of 2008 and is a wholly-owned subsidiary  
23 of Google.

24              Next, the current lawsuit was filed on  
25 April the 20th, 2011, wherein Beneficial sued, among

1 others, Advance Publications, Inc.; ALM Media  
2 Properties, LLC; American Media, Inc.; Autotrader.com,  
3 Inc.; and Demand Media, Inc.

4           These companies are referred to  
5 collectively as the accused Google customers. In this  
6 lawsuit, Beneficial alleged that each of these companies  
7 infringe the '702 and the '943 patents.

8           Those are the stipulations.

9           Google alleges that Beneficial breached  
10 the settlement agreement by suing the accused Google  
11 customers for infringement of the '702 and '943 patents  
12 based on their use of Google's DoubleClick product.

13           Google also claims that Beneficial's  
14 breach caused harm to Google. Beneficial denies that it  
15 breached the settlement agreement and denies that Google  
16 was harmed.

17           To recover damages from Beneficial for  
18 breach of contract, Google must prove all of the  
19 following:

20                   (1) that Beneficial failed to do  
21 something that the contract required it to do or did  
22 something that the contract prohibited it from doing;

23                   And (2) that Google was harmed by  
24 Beneficial's conduct.

25           On the other hand, if you decide that

1 Beneficial failed to do something that the contract  
2 required it to do or did something that the contract  
3 prohibited it from doing but also that Google was not  
4 harmed by Beneficial's conduct, then you may still find  
5 that Beneficial breached the settlement agreement and  
6 award Google nominal damages such as 1 dollar.

7           In reviewing the settlement agreement,  
8 here are several general rules to guide you.

9           You should assume that the parties  
10 intended the words in their contract to have their usual  
11 and ordinary meaning unless you decide that the parties  
12 intended the words to have a special meaning.

13           In deciding what the words of a contract  
14 meant to the parties, you should consider the whole  
15 contract, not just isolated parts. You should use each  
16 part to help you interpret the others so that all the  
17 parts make sense when taken together.

18           You should assume that the parties  
19 intended technical words used in the contract to have  
20 the meaning that is usually given to them by people who  
21 work in that technical field unless you decide that the  
22 parties clearly use the words in a different sense.

23           The settlement agreement at issue is a  
24 contract and contains a license to certain United States  
25 patents, including the '702 and the '943 patents. I'll

1 now explain what a patent is, what a license is, what is  
2 direct patent infringement, and what is indirect patent  
3 infringement.

4           Patents are granted by the United States  
5 Patent and Trademark Office, often called the PTO. A  
6 valid United States patent gives the patent holder the  
7 right, for up to 20 years from the date of the patent  
8 application, to prevent others from making, using,  
9 offering to sell, or selling the patented invention  
10 within the United States or from importing it into the  
11 United States without the patent holder's permission.

12           A violation of the patent holder's rights  
13 is called infringement. The patent holder may try to  
14 enforce a patent against persons it believes to be  
15 infringers by a lawsuit brought in a federal court.

16           A license to a patent is permission to  
17 make, use, or sell the patented invention. A license  
18 may be granted by a patent holder in exchange for a fee  
19 called a royalty or other compensation.

20           The claims of a patent, which are  
21 commonly referred to as the claims, may describe  
22 apparatuses, methods, products, such as machines or  
23 chemical compounds or processes for making or using a  
24 product. In this case, both apparatus and method claims  
25 are at issue. Claims 1, 49, and 67 of the '943 patent

1 are method claims. Claim 53 of the '702 patent is an  
2 apparatus claim.

3           A patent claim sets forth in words a set  
4 of requirements in a single sentence. These claim  
5 requirements are usually divided into parts or steps  
6 called limitations or elements. For example, a claim  
7 that covers the invention of a table may recite a  
8 tabletop, four legs, and the glue that secures the legs  
9 to the tabletop. In this example, the tabletop, legs,  
10 and glue are each separate limitations of the claim.

11           There can be several claims in a patent.  
12 A claim may be narrower or broader than another claim by  
13 setting forth more or fewer requirements.

14           You first need to understand what each  
15 claim covers in order to decide whether or not there is  
16 infringement of the claim. The law says it is my role  
17 to define the terms of the claims, and it is your role  
18 to apply my definitions to the issues that you are asked  
19 to decide in this case. Therefore, as I explained to  
20 you at the start of the case, I have determined the  
21 meanings of certain claim terms, and I have provided you  
22 those definitions of these claim terms. These are in  
23 your juror notebooks.

24           You must accept my definitions to these  
25 words in the claims as being correct. It is your job --

1 job to take these definitions that I have supplied and  
2 apply them to the issues that you are asked to decide,  
3 including both the issues -- including the issue of  
4 infringement. For the claim terms that I've not  
5 construed or defined, you are to use the ordinary  
6 meaning of the term in the context of the patent.

7           I'll now explain how a claim defines what  
8 it covers. When a product or service meets all the  
9 requirements of a claim, the claim is said to cover that  
10 product, and that product is said to fall within the  
11 scope of that claim. In other words, a claim covers a  
12 product where each of the claim elements or limitations  
13 is present in that product. If a product is missing  
14 even one limitation or element of a claim, the product  
15 is not covered by the claim.

16           If the product is not covered by the  
17 claim, the product does not infringe that claim, unless  
18 there is infringement by the Doctrine of Equivalents,  
19 which I'll explain later. A claim requirement may  
20 describe a certain functionality or capability that the  
21 device must possess. In such cases, a device satisfies  
22 the requirement if it is reasonably capable of operating  
23 in the recited manner.

24           Patent claims may exist in two forms  
25 referred to as independent claims and dependent claims.

1           An independent claim does not refer to  
2 any other claim of the patent. An independent claim  
3 sets forth all of the requirements that must be met in  
4 order to be covered by that claim. It is not necessary  
5 to look at any other claim to determine what an  
6 independent claim covers.

7           A dependent claim, however, refers to at  
8 least one other claim in the patent. A dependent claim  
9 includes each of the limitations of the other claim to  
10 which it refers as well as the additional limitations  
11 recited in the dependent claim itself. In this way, the  
12 claim depends on another claim. To determine what a  
13 dependent claim covers, it's necessary to look at both  
14 the dependent claim and any other claim or claims to  
15 which it refers.

16           To find infringement of a dependent  
17 claim, you must first determine whether the independent  
18 claim to which it refers has been infringed. Thus,  
19 you -- thus, you must consider all the limitations of  
20 both the dependent claim and the independent claim from  
21 which it depends. If you decide that the independent  
22 claim has not been infringed, then the dependent claim  
23 cannot have been infringed.

24           If you decide that the independent claim  
25 has been infringed, you must then separately determine

1 whether each additional requirement of the dependent  
2 claim has also been infringed. If each additional  
3 requirement has been -- has -- if each additional  
4 requirement has been included, then the dependent claim  
5 has been infringed.

6           The beginning portion or preamble of a  
7 number of claims use the word comprising. The word  
8 comprising, when used in the preamble, means including  
9 or containing. When com -- comprising is used in the  
10 preamble, a device that includes all the limitations of  
11 the claim is covered by the claim, even if the device  
12 contains additional elements.

13           In reaching your decision on  
14 infringement, keep in mind that only the claims of a  
15 patent can be infringed. You must compare the asserted  
16 patent claims as I have defined each of them to the  
17 accused products and determine whether or not there is  
18 infringement. You should not compare accused products  
19 with any specific example set out in the patent or with  
20 the patent holder's commercial products or with prior  
21 art. The only correct comparison is with the language  
22 of the claim itself as I have explained its meaning to  
23 you.

24           You must consider each claim individually  
25 and must -- must reach your decision as to each

1 assertion of infringement based on my instructions about  
2 the meaning and scope of the claims, the legal  
3 requirements for infringement, and the evidence  
4 presented to you by the parties.

5 I'll first tell you about direct  
6 infringement. Then I will tell -- then I will tell you  
7 about inducement of infringement, and lastly, I'll tell  
8 you about contributory infringement.

9 A patent can be directly infringed even  
10 if the alleged infringer did not have knowledge of the  
11 patent and with -- and without the infringer knowing  
12 that what it was doing was infringement of the claim. A  
13 patent may also be directly infringed even though the  
14 accused infringer believes in good faith that what it's  
15 doing is not infringement of the patent.

16 Infringement does not require proof that  
17 a party copied the asserted patent claims.

18 To prove direct infringement by literal  
19 infringement of the asserted method claims, Google must  
20 prove by a preponderance of the evidence that the  
21 accused Google customers performed each and every step  
22 of the claimed method in the United States. Google must  
23 prove this separately for each of the accused Google  
24 customers.

25 To prove direct infringement by literal

1 infringement of the asserted apparatus claims, Google  
2 must prove by a preponderance of the evidence that the  
3 accused Google customers made, used, sold, or offered  
4 for sale within the United States products that include  
5 each and every requirement of the asserted apparatus  
6 claims.

7           To infringe a patent claim, it must be  
8 proved by a preponderance of the evidence that the  
9 product or method of use includes each and every  
10 requirement of Beneficial's asserted claims. In  
11 determining whether an accused product or service  
12 infringes one or more of the asserted claims in this  
13 case, you must compare the accused product or service  
14 with each and every one of the requirements of the claim  
15 to determine whether an accused product or service  
16 contains each and every requirement recited in a claim.

17           A claim requirement is present if it  
18 exists in an accused product or service or its method of  
19 use just as it's described in the claim language,  
20 either -- either as I've explained the language to you,  
21 or if I did not explain it, as it would have been  
22 understood by one of ordinary skill in the art.

23           Any one of the accused products or  
24 methods -- if any one of the accused products or methods  
25 omits any requirement recited in a claim, then you must

1 find that the particular product or method does not  
2 literally infringe that particular claim.

3           You must determine separately for each  
4 asserted claim whether or not there is infringement.

5           Direct infringement requires a party to  
6 practice each and every element of a claimed invention.  
7 Where no single party practices every element of a  
8 claimed invention but more than one party practices  
9 every element of a claimed invention, the claims  
10 nonetheless may be directly infringed, if one party has  
11 control over the practice of each and every element of  
12 the claimed invention so that the practice of all  
13 elements of the claimed invention is attributable to the  
14 controlling party.

15           In deciding whether Beneficial breached  
16 the settlement agreement, you must determine whether the  
17 accused Google customers are licensed pursuant to the  
18 provisions of the settlement agreement that relate to  
19 indirect infringement.

20           Google alleges that the accused Google  
21 customers' use of DoubleClick would constitute indirect  
22 infringement of the patents by Google, except for the  
23 license provision of the settlement agreement.

24           There are two types of indirect  
25 infringement: Inducing infringement and contributory

1 infringement.

2           The act of encouraging or inducing others  
3 to infringe a patent is called inducing infringement.

4           The act of contributing to the  
5 infringement of others by, for example, supplying them  
6 with a component for use in the patented invention is  
7 called contributory infringement.

8           A party induces patent infringement if it  
9 purposefully causes, urges, or encourages another to  
10 infringe the claims of a patent.

11           Inducing infringement cannot incur  
12 unintentionally. This is different from the direct  
13 infringement that I previously described which can occur  
14 unintentionally.

15           To prove that Google induced patent  
16 infringement such that the accused Google customers are  
17 licensed under the settlement agreement, Google must  
18 prove by a preponderance of the evidence that:

19                   (1) Google knew of the patent at that  
20 time;

21                   (2) Google actively encouraged or  
22 instructed another person on how to use a product or  
23 perform a process in a way that infringes at least one  
24 patent claim;

25                   (3) Google knew or should have known that

1 the encouragement or instructions would result in  
2 infringement of at least one patent claim;

3 And (4) the other person infringed at  
4 least one patent claim.

5 To prove induced infringement, Google  
6 must prove that it had a specific intent to induce the  
7 infringement. Google must prove that it knowingly  
8 induced infringement, not merely that it knowingly  
9 induced the acts that constitute infringement. The  
10 specific intent to induce infringement may be shown by  
11 circumstantial evidence.

12 Finally, Google must prove that there is  
13 a direct infringement for each instance of indirect  
14 infringement.

15 The other type of indirect infringement  
16 is contributory infringement. As with direct  
17 infringement, you must determine contributory  
18 infringement on a claim-by-claim basis.

19 Contributory infringement can occur when  
20 a party, with knowledge of the patent, supplies a part  
21 or a component to another for use in a patented product  
22 or machine or in a patented process.

23 In order for there to be contributory  
24 infringement by Google, someone other than Google must  
25 directly infringe one or more claims of the '702 and/or

1 the '943 patents. If there is no direct infringement by  
2 anyone, there can be no contributory infringement.

3 If you find direct infringement of the  
4 '702 and/or the '943 patents, then contributory  
5 infringement exists if Google proves each of these  
6 factors by a preponderance of the evidence:

7 (1) Google supplied, sold, or offered to  
8 sell a component within the United States for use in a  
9 product, apparatus, or process during the time  
10 Beneficial's patents are in force;

11 (2) The component is not a common or  
12 staple item and has no substantial non-infringing use;

13 (3) The component constitutes a material  
14 part of the invention;

15 And (4) Google sold or offered for sale  
16 the component with the knowledge of the '702 and/or '943  
17 patents and knowledge that the component was especially  
18 made or adapted for use in an infringing manner.

19 To prove contributory infringement,  
20 Google must prove each of the above requirements.

21 This completes my instruction on the  
22 applicable -- applicable law in this case, and we will  
23 now hear closing arguments from the attorneys from the  
24 parties.

25 The Plaintiff may present its first

1 closing argument.

2 MS. ANDERSON: Thank you, Your Honor.

3 May I request a warning at 15 minutes?

4 THE COURT: You may.

5 MS. ANDERSON: Thank you.

6 THE COURT: You may proceed, Counsel.

7 MS. ANDERSON: Thank you, Your Honor.

8 Good morning, ladies and gentlemen. It's  
9 such a privilege to be here with you today and to thank  
10 you on behalf of Google for all the time that you have  
11 devoted to this case. Again, it is such an important  
12 service, and both parties thank you. It is a service of  
13 our country's justice system and so very important.

14 We're now at the part of the case where  
15 you're almost to the point you can actually talk about  
16 the evidence with each other and discuss it and  
17 deliberate over the facts and the law. And throughout  
18 the course of your deliberations, you will have before  
19 you all the law as presented by the Judge.

20 And you may remember at the beginning of  
21 this case, I began by talking with you about the subject  
22 of promises.

23 If I could have the next slide, please,  
24 Ben.

25 We started talking about promises, and I

1 told you at the bottom of this case is the fact that  
2 Beneficial made promises, and Beneficial broke them,  
3 after having taken \$2.45 million from Google in exchange  
4 for certain licenses. And I told you that it would  
5 really boil down to these four key points of evidence  
6 that we discussed at the very beginning of this case.

7           Well, now at the end of the evidence, we  
8 can actually break this down more, because we actually  
9 have seen the evidence that has come in. And what I'd  
10 like to do is go through with you a brief timeline of  
11 events and cover some of the important evidence that you  
12 have heard through the course of the trial.

13           Your Honor, may I have permission to  
14 approach the easel?

15           THE COURT: You may.

16           MS. ANDERSON: So, ladies and gentlemen,  
17 I will try to talk loud here, but please raise your hand  
18 if you can't hear me.

19           You may remember from the course of the  
20 evidence, and it's agreed by both parties that back in  
21 2007, we had the first lawsuit. And it was a lawsuit in  
22 which Beneficial said that Google and other companies  
23 were infringing the '702 patent.

24           Beneficial -- I'm going to abbreviate  
25 Beneficial with a B -- said there was infringement.

1 Google -- Google denied infringement and said it was not  
2 infringing. And that lawsuit started and it started a  
3 series of case events.

4           So then we have 2009. Another lawsuit  
5 Beneficial files on the '943 patent. And what does  
6 Beneficial say? Again, it says Google is infringing.  
7 Google and other customers were sued as well. We have  
8 Google denies infringement.

9           These are lawsuits in which we heard  
10 testimony from Mr. Trinh. They're lawsuits over the --  
11 the method of advertising on websites. It's lawsuits in  
12 which Beneficial said both those patents were infringed.  
13 And it's lawsuits in which DoubleClick was discussed as  
14 part of discovery, using DoubleClick to put up ads.

15           So what happens?

16           The parties fight in those lawsuits for a  
17 few years. And you heard from Mr. Trinh that Google  
18 decided that it would stop fighting and agree to a  
19 settlement agreement. 2010, we have the settlement.  
20 And there is a license. A license.

21           This settlement license, which is Exhibit  
22 1, which you'll have in the jury room and it's in your  
23 juror notebooks, you may remember it had whereas  
24 clauses. Those are recitals where the parties agree,  
25 hey, we are resolving this 2011 -- 2007 lawsuit. We're

1 resolving the 2009 lawsuit.

2           At the very bottom there, it says the  
3 parties desire to settle and resolve all differences and  
4 disputes that may -- may -- that exist or may exist.  
5 They wanted peace. They agreed to licenses, and they  
6 wanted to resolve disputes. That's what they said in  
7 the agreement.

8           And as part of that agreement, we know  
9 Google agreed to and did pay \$2.45 million.

10           So what happens?

11           This is November 2010. Only a few months  
12 later, in 2011, Beneficial sues all over again.

13           Beneficial files a lawsuit and alleges  
14 infringement of the '702 and the -- the '943 patent all  
15 over again. Beneficial says infringement. Beneficial  
16 sues Google customers, customers that use DoubleClick.

17           And Google says, deny infringement.

18           Why? Because we are licensed. Our  
19 customers -- our customers are licensed. We deny  
20 infringement, because we have the right to use those  
21 inventions. We paid money. We resolved the dispute.

22           Ladies and gentlemen, that -- that is the  
23 breach. This was resolved. The parties had agreed to  
24 license terms. This is the breach.

25           So what happens next?

1 Well, 2012, 2013, these are years in  
2 which that 2011 lawsuit continues. And you heard  
3 evidence about the fact that discovery went on through  
4 those cases. And discovery is an exchange of  
5 information and situations in which Beneficial was asked  
6 questions about Google and Beneficial was asked  
7 questions about: Are you accusing Google customers of  
8 infringing, and are you accusing them of infringing  
9 because of using DoubleClick products, the stuff --  
10 DoubleClick products that were implicated in those  
11 earlier products.

12 Well, Beneficial says, oh, yeah.  
13 Beneficial says again and again in Exhibit 12, in  
14 Exhibit 13, in Exhibit 88, and Exhibit 8 and 9. Very  
15 important exhibits in this case.

16 Exhibit 12, if we could have that up on  
17 the screen, please, Ben.

18 Exhibit 12 is a response to certain  
19 interrogatories. They're questions that Beneficial had  
20 to answer. And remember, there's a little bit of  
21 switching of who's named the Plaintiff here. This  
22 Exhibit 12, Plaintiff is actually Beneficial, and you  
23 can see that on the front page. And Beneficial had to  
24 answer those questions.

25 So if we could have the next, Page 3 of

1 this exhibit up there, Ben. The first line of that  
2 sentence, if we could highlight it.

3           Plaintiff contends that each of the  
4 accused Google partners infringes the patent-in-suit.  
5 And then the last sentence, Ben, if we could highlight  
6 that.

7           And that -- that was Beneficial's  
8 position. Whether the ads are served by Google or  
9 someone else doesn't change the analysis.

10           They are admitting -- and this is an  
11 interrogatory response. As you heard from the Judge,  
12 that's as good as testimony. That's Beneficial's  
13 testimony in this case.

14           Then we have Exhibit 13, ladies and  
15 gentlemen, which also you'll have with you in the jury  
16 room. These are Beneficial's responses to Google's  
17 requests for admission. This is -- this is a fact in  
18 this case. What they admit in this is a fact in this  
19 case.

20           Ben, if we could please show the page --  
21 second page. Let's show the jury what the question is  
22 on the second page of Exhibit -- yes, Exhibit 13.

23           Yeah, there we go.

24           The question is: Please admit that  
25 Beneficial's allegations of infringement against Advance

1 Publications are based at least in part on its use of an  
2 advertising product included by Google, including but  
3 not limited to DoubleClick. Google asked that question  
4 with respect to all the accused Google partners.

5 And what was Beneficial's answer?

6 Let's see the next slide, please.

7 It said: Whether the advertising  
8 presentations are served by Google, some other party, or  
9 by a Defendant itself does not change the analysis.

10 Plaintiff admits that its contentions are  
11 based at least in part on the Defendant's use of  
12 advertising presentations. Here, Beneficial's saying we  
13 are accusing customers of infringing, and we are not  
14 carving out Google. It doesn't matter. We're saying  
15 everything they are doing infringes.

16 And that is -- as the Court explained to  
17 you, this is an admission that must be accepted as true,  
18 because this is Beneficial's own admission in a request  
19 for admission.

20 So if -- if we could take that down,  
21 please, Ben.

22 You also heard lots of testimony about  
23 Exhibits 8 and 9. And as you'll see in the jury room,  
24 Exhibits 8 and 9, those are the infringement  
25 contentions. These are big, very big documents. You

1 heard testimony that the appendix to these documents is  
2 more than a hundred pages long. And it sets out in  
3 detail all of the explanation why Beneficial says Google  
4 customers are infringing. And never once said that they  
5 were carving out in any way Google products.

6               So this is Beneficial embracing their  
7 view that they put forth to the Court in order to get  
8 more money from Google customers, their view that Google  
9 customers infringe both patents, for the way they do  
10 advertising using Google products. So here, again,  
11 Beneficial saying infringement. Google's denying  
12 infringement because licensed, okay?

13               So now here we are in 2014, and we're in  
14 the trial. What does Beneficial say?

15               Beneficial is running away from  
16 everything it said in the course of this case before in  
17 discovery and saying: Oh, no, you can't prove  
18 infringement. There's no infringement here. Even  
19 though there's evidence in the case that we said there  
20 is, we don't think that's true anymore. They're denying  
21 infringement all of a sudden, because, ladies and  
22 gentlemen, you heard from Dr. Almeroth.

23               They apparently settled with those  
24 customers that they chased in lawsuits and accused of  
25 infringement and wrote those long documents to get them

1 to settle.

2 Ladies and gentlemen, this is wrong. The  
3 only party that's been inconsistent here is Beneficial,  
4 because it suits them in this trial to do that.

5 Hold them to their word.

6 So let's take a moment, ladies and  
7 gentlemen -- I'm going to leave the easel.

8 And if I can, Ben, could I please have  
9 Slide 3.

10 I'm going to touch briefly on the core  
11 things that Members of the Jury will be addressing in  
12 the course of your deliberations. The fundamental  
13 question here, which will be on the verdict form, is  
14 whether or not Beneficial breached the contract  
15 settlement agreement.

16 Did it do something that it wasn't  
17 allowed to do, sue in violation of the license  
18 provision.

19 And was Google harmed? It was.

20 Let's talk about that quickly. First of  
21 all -- Slide 4, please.

22 You know that it provided for a payment  
23 that was made. It is undisputed.

24 Next slide, please.

25 We know that this is the license

1 provision, and you'll have it before you in the jury  
2 room, but this is the core license provision at issue in  
3 this case.

4                   Next slide, please.

5                   We know that this has been diagrammed.

6                   And, ladies and gentlemen, I have this up  
7 here with some circles. This is the part of Section 2-A  
8 that deals with the license to the customers, and we saw  
9 in the beginning of the case that what it talks about is  
10 the fact that Defendants and their affiliates past,  
11 current, and future partners.

12                   Well, they're customers. Those are the  
13 folks that get the benefit of the license. They have a  
14 license but only to the extent of their role in using,  
15 using the products or services of the Defendants.

16                   That's Google. And only to the extent  
17 that the act by such partner would constitute direct or  
18 indirect infringement of a claim of the licensed patents  
19 by Google.

20                   So here, ladies and gentlemen, the  
21 question that you're posed with is: Do we have using  
22 and do we have indirect infringement? And you may  
23 remember indirect infringement is something that comes  
24 in two flavors, inducement and contributory  
25 infringement.



1 case, and nothing has contradicted that testimony that  
2 the customers that were sued use DoubleClick to show ads  
3 just like in this picture we saw earlier in the  
4 advertisement for iTunes in the top right corner.

5 THE COURT: You've used 15 minutes,  
6 Counsel.

7 MS. ANDERSON: Thank you, Your Honor.

8 Next slide, please.

9 So let's move on to the second bullet,  
10 because the first bullet is undisputed.

11 Second bullet: How do we know that  
12 Google induces customers to do advertising in a way that  
13 Beneficial says infringes?

14 Well, ladies and gentlemen, let's look at  
15 the elements of what you need to show to have  
16 inducement. And what I have on the board here is a  
17 paraphrase of the Court elements of inducement.

18 Again, it is the Judge's instructions  
19 that govern, but I have paraphrased them on a -- on a  
20 slide here just to make it a little easier to go through  
21 together.

22 First of all, to show inducement, you  
23 need to show that there was knowledge of the patent at  
24 the time. There's no dispute here that Google was aware  
25 of those patents. It was sued on them starting in 2007.

1 So knowledge of the patent, proven.

2                   Second element: Do we have active  
3 encouragement or instruction of customers on how to use  
4 a product in a way that infringes?

5                   Well, ladies and gentlemen, you heard so  
6 much testimony from Mr. Jonathan Bellack, none of it  
7 contradicted, about all the things that Google does to  
8 instruct and encourage customers to use Google's  
9 DoubleClick products to show ads in the websites, the  
10 very websites that were sued for doing that very  
11 advertising.

12                   So active encouragement and instruction,  
13 absolutely met.

14                   Now, let's go to the third bullet  
15 point -- actually, before I move on, and in a way that  
16 encourages at least one patent claim.

17                   Ladies and gentlemen, you heard from  
18 Mr. Trinh and Mr. Bellack Google has instructed and  
19 encouraged our customers to use those -- those products  
20 in just the way that in the contentions, Beneficial says  
21 infringes the patent.

22                   So this element has been met.

23                   Third element: Knew or should have known  
24 that the encouragement or instructions would result in  
25 infringement of at least one patent claim.

1                   Certainly, ladies and gentlemen, having  
2 shown that Google was aware of these patents, that  
3 Google continued to instruct and encourage its customers  
4 to use those products just the way they'd always been  
5 using them, that is showing of the knowledge necessary  
6 here.

7                   And we know that in this case, Google  
8 knew Beneficial was saying that that's infringing of the  
9 patent. They've been saying it since 2007. So that has  
10 been proven with that evidence.

11                   And finally, infringement of at least one  
12 patent claim.

13                   Ladies and gentlemen, that's been proven  
14 by the words of Beneficial itself. Those exhibits I  
15 went through with you from 2012 and 2013, including  
16 binding statements on Beneficial, admissions by  
17 Beneficial of what they say to be true, that establishes  
18 here that under Beneficial's theory of this case, their  
19 own words, there is infringement.

20                   So let's turn now to Slide 21, please.  
21 Thank you.

22                   So let's go to the subject of  
23 contribution. Contributory infringement is something  
24 that, again, has multiple elements, as you heard from  
25 the Court.

1                   Can we have Slide 22 up? Thank you.

2                   It has multiple elements. And, again, I  
3 have paraphrased them. It is the Judge's instruction  
4 that governs. You have to have direct infringement of  
5 the patent.

6                   Ladies and gentlemen, just like in  
7 inducement, as we just talked about, proven by the words  
8 of Beneficial itself.

9                   And you heard -- you heard criticism from  
10 Dr. Almeroth criticizing Dr. Alexander for not having  
11 done an infringement analysis and criticizing through  
12 the questioning of Dr. Alexander, but yet we were  
13 relying here on evidence from the mouth of Beneficial  
14 itself, and you never heard Dr. Almeroth once say that  
15 he looked at those contentions and didn't agree with  
16 them and thought they were false. Never said it. The  
17 gentleman who was hired by an expert by Beneficial never  
18 did that here.

19                   So what the -- the evidence we have  
20 before us today are all the words that Beneficial made  
21 in these proceedings about what they think infringes.

22                   So let's go now to the second bullet  
23 point: Supplied a component for use in a product or  
24 apparatus. There's undisputed evidence that Google  
25 provides DoubleClick for use in the websites that have

1 been accused.

2 Third element: Component is not a common  
3 or staple item and has no substantial non-infringing  
4 use.

5 And there are instructions on this, but  
6 at its core, this is an argument by Beneficial  
7 suggesting that they have proven that there's no  
8 contribution, because they claim Google's DoubleClick  
9 has substantial non-infringing uses under their theory  
10 of this -- of the infringement.

11 However, if you listen closely to the  
12 evidence and review closely the evidence and review in  
13 your memory the testimony of the witnesses, you'll  
14 recall that the evidence put forward on substantial  
15 non-infringing uses, much of it only applied to some of  
16 the claims at issue, not all.

17 And if Beneficial sued on even one of  
18 those claims with respect to which there were no  
19 substantial non-infringing uses, that's breach.

20 Secondly, we know that the evidence they  
21 put forward on substantial non-infringing use wasn't  
22 substantial at all. We heard testimony on, for example,  
23 on whether or not users disable cookies. That is  
24 something that is very infrequently done, and we heard  
25 that from Mr. Bellack himself.

1                   So, ladies and gentlemen, that -- that  
2 establishes that Google's DoubleClick is not a common or  
3 staple item and has no substantial non-infringing use  
4 under Beneficial's theory.

5                   Fourth point, we know this from  
6 Mr. Goldberg's testimony that we heard on -- on the  
7 deposition tape. We know it from the testimony we heard  
8 throughout this case about Google's DoubleClick ad tag.  
9 And the products related to it clearly are a material  
10 part of performing what Beneficial says is that its  
11 invention can't even show an ad without that in the  
12 website. And we heard that from the witnesses  
13 throughout the case. That is how the ad gets there, and  
14 the heart of the invention is the use of an ad with  
15 content.

16                   And finally, that the component was sold  
17 or offered for sale with knowledge of the patent and  
18 knowledge that it was especially made or adapted for use  
19 in an infringing manner.

20                   Ladies and gentlemen, we have shown this  
21 and discussed it earlier, but Google's DoubleClick's  
22 only purpose is to get those ads to show. So that  
23 element has been satisfied.

24                   If I can go back to Slide 3, please, Ben.

25                   So, ladies and gentlemen, under the

1 license, Beneficial did something the contract  
2 prohibited it from doing. It sued customers when they  
3 were licensed and never should have been sued.

4 And the second bullet point is that  
5 Google has been harmed.

6 Ladies and gentlemen, Google bought peace  
7 for its customers. Google bought peace under the terms  
8 of the license, and those terms have been met here, and  
9 they should never have been sued, which Beneficial did  
10 in contravention of that agreement.

11 So, ladies and gentlemen -- if I could go  
12 to Slide 27.

13 I ask that you please, please hold  
14 Beneficial to its promises. Beneficial was paid for  
15 those licenses, and Beneficial should live up to those  
16 licenses here.

17 We'll ask that at the end of your  
18 deliberations, you please find that Beneficial has  
19 breached its contract with Google.

20 Thank you very much.

21 THE COURT: Thank you, Counsel.

22 If you'll take your board down and move  
23 the easels.

24 MR. JONES: Can I help with that, Your  
25 Honor?

1 THE COURT: You may assist.

2 MR. JONES: Thank you.

3 THE COURT: And Defendant may prepare to  
4 address the jury with its final arguments.

5 MR. ADAMS: May I approach, Your Honor?

6 THE COURT: You may.

7 MR. ADAMS: Thank you.

8 THE COURT: Would you like a warning, Mr.  
9 Adams?

10 MR. ADAMS: Five minutes would be fine,  
11 Your Honor.

12 THE COURT: All right. You may proceed  
13 when you're ready.

14 MR. ADAMS: Thank you.

15 Good afternoon -- we're almost to the  
16 afternoon. We're still in the morning session. Good  
17 morning, Members of the Jury.

18 There is some inconsistency in this case.  
19 Someone is being inconsistent, and one of the questions  
20 you're going to have to answer is who is. Who is taking  
21 an inconsistent position?

22 What Google wants you to believe is that  
23 Beneficial at some point accused Google of infringement  
24 that is now suggesting that there is no infringement.

25 Let's be clear about this.



1 Well, here's what you know. Mr. Trinh  
2 got up on the stand and what he told you was this: At  
3 no point either when we sued them or today -- well,  
4 yesterday or the day before when he testified, did  
5 Google ever admit that they infringed, whether they  
6 infringed using their website or whether they infringed  
7 indirectly by providing DoubleClick.

8 They've never admitted that. That's  
9 never been their position, and they don't want to even  
10 make that position here today. They don't believe it.  
11 They don't believe that using DoubleClick causes them to  
12 be indirectly infringing. But in order for them to show  
13 their case in this case -- or prove their case here,  
14 they have to take the inconsistent position that giving  
15 DoubleClick causes them to be indirectly infringing.

16 That's the inconsistency in the case.  
17 It's not on us. It's on them.

18 What -- what is the case about? What is  
19 it about?

20 Counsel for Google wants you to believe  
21 that this is a case about them seeking peace for their  
22 partners, and because we sued their partners, we  
23 violated that. That's what they want you to believe.

24 This, Members of the Jury, is what the  
25 license agreement would have looked like if, in fact,

1 they had bargained for peace, complete peace. It would  
2 have looked like this. It would have ended at the point  
3 where it said we've got a license to you, Google, and a  
4 license to your current and future partners, whether  
5 direct or indirect. It would have ended right there.  
6 That's complete peace. That means you are licensed;  
7 your partners are licensed.

8           They would have said in a covenant not to  
9 sue, Beneficial hereby irrevocably and unconditionally  
10 covenant not to sue or to bring any legal action against  
11 Google, YouTube, NBC, or their customers. If they  
12 wanted peace, if that's what they had bargained for,  
13 that is what the license agreement would have looked  
14 like.

15           But you know, Members of the Jury, that  
16 that's not what it looks like. It looks like this  
17 (indicating), and they admit it. It is not a complete  
18 license. It is a limited license. And we understand  
19 what that limit is. The limit is, is that you are only  
20 licensed, customers, if when we give you DoubleClick, we  
21 are contributorily infringing, or we're inducing you to  
22 infringe because of the patent. That's the limit.

23           Now, here's the rub. When Google  
24 executed this license agreement, Mr. Trinh told you that  
25 at the moment they signed on this document, they did not

1 believe that giving DoubleClick would cause them to be  
2 indirectly infringing.

3                   So what happens?

4                   Well, they get letters now. After  
5 Beneficial sues their customers, they get letters  
6 saying, hey, are we covered by the license?

7                   At the moment Google gets those letters,  
8 they have a decision to make in their head. What do we  
9 tell our customers? Do we tell them, well, what we  
10 really licensed or -- or bargained for was a license  
11 that didn't cover you, because we knew at the time that  
12 when we gave you DoubleClick, we knew we weren't  
13 indirectly infringing. Do they tell that to their  
14 customers?

15                   Or do they pick a fight with us,  
16 Beneficial? They had a decision to make.

17                   This case is about the fact that Google  
18 was embarrassed to go to their customers and say, look,  
19 you may have thought you had a full license. You may  
20 have thought you had a blanket license to our  
21 customer -- our products, but we didn't bargain for  
22 that. We bargained for a limited license, and we know  
23 you're not licensed.

24                   They're embarrassed to tell them that.  
25 So you know what they did? They picked a fight with

1 Sheldon Goldberg and his company. That's what they did.  
2 That's what this case is about.

3           You have to find -- and it's not our  
4 burden, Members of the Jury. They have to prove that  
5 DoubleClick was licensed, and, therefore, their  
6 customers were licensed for using DoubleClick, because  
7 they are liable for indirect infringement. It was all  
8 their burden.

9           If, Members of the Jury, I didn't put on  
10 Dr. Almeroth or any other witness and I stood up at the  
11 end of their case and I said, Your Honor, Defendant  
12 rests. We have full right to do that. You then look to  
13 only what they put on to see whether or not they proved  
14 their case. That's the way the rules work.

15           Well, what do we know about the evidence?

16           The jury instruction that you will see  
17 says that there has to be all of these things met by  
18 them. They have to put the evidence on to establish it.

19           The second thing is this, Point 2: The  
20 component -- and we're talking about DoubleClick -- is  
21 not a common or staple item that has no substantial  
22 non-infringing uses. Everything that defense -- or  
23 Plaintiff's counsel just said to you suggested that we  
24 had to prove that there were substantial non-infringing  
25 uses.

1                   That is not the way it works. We didn't  
2 have to prove anything. We did, but we didn't have to.  
3 They had to show you that there were no substantial  
4 non-infringing uses for DoubleClick. That was their  
5 burden, not ours.

6                   Look at No. 4. Google -- they had to  
7 show that Google sold or offered DoubleClick and that  
8 DoubleClick was especially made or adapted for use in  
9 the infringing manner. That is, they have to show that  
10 when they made DoubleClick, they made it especially  
11 adapted to infringe the '702 patent and the '943 patent.

12                   That's what this -- this -- this  
13 instruction says.

14                   Well, what do we know?

15                   Look at the evidence they put on to try  
16 to show you that this product did not have a substantial  
17 non-infringing use. What -- what did they put on?

18                   They put on their expert who said to you  
19 he wasn't here to offer any opinions on whether  
20 DoubleClick has non-infringing uses. He wasn't offering  
21 any opinions on infringement period. That was their  
22 evidence. On that, they have failed.

23                   We went further, though. We presented  
24 the testimony of Dr. Almeroth, who gave you three bases  
25 on which DoubleClick has non-infringing uses. Let me

1 give you an example using the Court's instruction about  
2 what we mean by substantial non-infringing uses.

3           Let's assume there's a patent and the  
4 patent is on a chair and the patent says you need a  
5 chair that has a seat, a back, two handles, four legs,  
6 and glue. That's the patent. Party A supplies the  
7 glue.

8           In order for there to be contributory  
9 infringement, that glue has to be made specifically to  
10 be used only in the chair. If the glue can actually  
11 glue a table, if it can glue pieces of paper, if it's  
12 made to glue the parts of the Lady of Justice over  
13 there, then providing that glue does not make you liable  
14 for contributory infringement.

15           That's what they have to show, and this  
16 is what we showed through Dr. Almeroth. There are other  
17 uses for DoubleClick.

18           Number one, what -- they can use  
19 DoubleClick on websites that don't use cookies.

20           Now, Dr. Alexander didn't dispute it,  
21 right? He didn't come in and say, well, I don't believe  
22 that's true. What did he try to do?

23           Well, when you heard from him, he tried  
24 to suggest it wasn't substantial, right? That it's  
25 done, but it's only done a little bit of times.

1 Well, Dr. Almeroth said: No, no, no.  
2 It's done many times. A lot of people disable cookies.  
3 You have to judge which one of these experts you want to  
4 believe.

5 But let me ask you this, Members of the  
6 Jury: If you had that question in your mind, the  
7 question being how many people disable cookies in  
8 today's day and age, what's the first thing you would  
9 do?

10 Well, I'll suggest many of us would  
11 Google it. We'd -- literally, we'll go to Google, put  
12 it on a search term (sic), and say how many people  
13 disable cookies. We would go straight to Google for the  
14 answer, right?

15 What did Dr. Alexander do? Did he go to  
16 them and say: Do a study; you've got a big website;  
17 let's try to find out how many people disable cookies  
18 when they come through your website?

19 No, he didn't do that. He went to  
20 Google, of course, but you know what they gave him?  
21 They gave him smorgasbork.com. They gave him a piece of  
22 paper from a website he had never heard of that did a  
23 study on one day about people that came to just their  
24 website, and he came in and tried to tell you that this  
25 was a scientific study that you should rely on to show

1 that disabling cookies was insubstantial.

2           Members of the Jury, you need to  
3 disregard this evidence, because Dr. Alexander could  
4 have done better, and he knows it. And when he was  
5 testifying, he was embarrassed by the fact that he was  
6 relying just on this piece of paper given to him by  
7 Google. You need to disregard it.

8           What about the other ways that they can  
9 use it? Well, Dr. Almeroth told you you can use it on  
10 websites that don't have registration. They don't have  
11 stores for storing user information. Because that's a  
12 requirement.

13           He gave two examples of it. It's one  
14 where you don't have a store, or even if you went to a  
15 website that had a store, had registration, and you  
16 didn't register. Those are ways that they use it.  
17 Undisputed by Dr. Alexander.

18           The third reason he gave: DoubleClick  
19 has used websites that do pop-up ads. That doesn't  
20 infringe our patent. That's another substantial  
21 non-infringing use.

22           What do they say? Well, we didn't just  
23 stop with the fact that Dr. Alexander never disputed it,  
24 that they didn't have any evidence; we went to their  
25 witnesses, and we elicited testimony from them that

1 proved our point.

2           For example, Mr. Bellack: DoubleClick  
3 can be used when you disable cookies. He admitted that.  
4 What about store for storing user identification? He  
5 admitted: DoubleClick can be used to serve ads on  
6 websites that do not store information, yes.

7           We asked him about whether or not you  
8 serve ads to people who don't register. He admitted it,  
9 yes. What about pop-up ads? Do you know whether  
10 DoubleClick is used by your customers to serve pop-up  
11 ads? It is sometimes, yes. From their own witnesses.

12           Now, the '943 wasn't talked a lot about,  
13 and it's for this reason. The '943 has this limitation  
14 that talks about the overlapping. In the corner at the  
15 top, I show you what that is. It's this overlapping the  
16 ad with the service. And what we know is, is that the  
17 Court's construction precludes DoubleClick from even  
18 infringing.

19           So using DoubleClick doesn't even  
20 infringe the '943 patent, and, therefore, it is, by  
21 definition, a substantial non-infringing use. There's  
22 no infringement.

23           So this is an issue you just need to move  
24 on and disregard. They haven't proven it, haven't even  
25 attempted to prove it. You need to move on.

1                   In a nutshell, this is the issue.  
2   DoubleClick is used to display ads on all websites.  
3   Once you determine this, and you know that there are  
4   some websites that don't infringe, you can't find  
5   there's contributory infringement.

6                   And they admitted it. There is no  
7   website that cannot display DoubleClick ads. That ends  
8   the story, Members of the Jury. Ends the story of  
9   contributory infringement.

10                  So what about inducement? Well, what we  
11   know from the Court's instruction is that inducement  
12   needs these limitations or these elements: They have to  
13   encourage in the way that infringes at least one patent,  
14   and they have to have the specific intent to do so.

15                  What's the evidence? They want you to  
16   make it seem as though what this claim or this  
17   instruction says is that they have to encourage or  
18   instruct in a way that infringes one element of a claim.  
19   Because all they've shown you is that they instruct on  
20   how to use the ad tag. That's all they've shown. They  
21   haven't even attempted to show that they instructed any  
22   of the other parts of the claims.

23                  But that's not enough. Here's what we  
24   know. The patent, the '702 patent, has a lot of  
25   limitations. The only part of this patent that refers

1 to or relates to the ad tag is in (h), the  
2 advertising-related information.

3 What about the '943? It's here.  
4 Advertising presentations. It's just one part of the  
5 claim of the patent, of the invention.

6 Well, what we know is they don't  
7 encourage their users to register. That -- Mr. Bellack  
8 admits that. They don't encourage any of their users  
9 to -- and by the way, this one is -- we not only went to  
10 Bellack, but we went to their customers.

11 So this is Conde Nast. Do they encourage  
12 you to do this at the store?

13 No. We heard it from their customers.  
14 What about from Viacom? Do they instruct you on the  
15 store?

16 No, they don't.

17 And, in fact, you heard Viacom's -- their  
18 customer said: They don't instruct us on anything on  
19 how to build our website. They don't do that.

20 What about cookies? This is an important  
21 part of our Claim 53. Bellack admits we don't instruct  
22 them on how to use cookies to identify. We don't.

23 Because of that, Members of the Jury, you  
24 will find that they don't induce, they don't instruct,  
25 they don't encourage on significant parts of this

1 invention.

2 In order for you to find inducement,  
3 you've got to find that they're inducing the patent, not  
4 just one claim, not just one part of one claim. They  
5 don't do it for the '702, and they don't do it for the  
6 '943.

7 So what about this issue of specific  
8 intent? You have got to find, in order to find that  
9 there was inducement, that they specifically intended  
10 when they gave DoubleClick that their customers were  
11 going to infringe our patents.

12 That's what they have the burden of  
13 proving. They haven't done that. Google has already  
14 admitted they have never formed the opinion ever that  
15 they infringe, that DoubleClick infringes. Mr. Trinh  
16 admits that.

17 They've said: Did you ever form the  
18 opinion that providing DoubleClick constitutes indirect  
19 infringement?

20 No.

21 So if they don't even believe it, if  
22 that's not their opinion, how could they be actively  
23 inducing their customers? They don't. They haven't  
24 proven the -- the -- any evidence of that. And, in  
25 fact, they've admitted the opposite.

1                   What about their position on the ad tags?

2                   We asked Mr. Trinh: Google's position on  
3 ad tags doesn't meet the claim limitations, right?

4                   No, they don't.

5                   He already -- he admits over and over:  
6 Given DoubleClick, the ad tags, we don't do that.

7                   But you've got to find specific intent.  
8 There is none.

9                   One of the things we asked Mr. Bellack  
10 was this: When you were training your customers, you  
11 couldn't have the intent to cause them to infringe the  
12 patent because you didn't know about the patent, right?  
13 And we asked that question because Mr. Trinh is the  
14 person that actually went out and does the instructions.  
15 He's the one that trains, encourages, right?

16                   He didn't even know about the patents,  
17 and he admitted: No, I could not have intentionally  
18 been inducing infringement because I didn't even know  
19 about them.

20                   This ends the debate. It ends the story.

21                   Mr. Alexander, their witness, their  
22 expert, he had no opinions. So they didn't put forth  
23 any opinions on this.

24                   Lastly, this issue of direct infringer,  
25 the Court will instruct you, if there is no direct

1 infringement by anyone, there can be no contributory  
2 infringement.

3                   What's the evidence? And, again, it's  
4 their burden, Members of the Jury. There is zero  
5 evidence that any of the five partners that they  
6 intervened for infringes any of the patents.

7                   We asked Mr. Trinh: You understand that  
8 you needed to present to this jury evidence that  
9 somebody infringed?

10                   He answered: Yes.

11                   And you have full opportunity to have an  
12 expert that, if hired, would do that infringement  
13 contention.

14                   And he answered: Yes.

15                   The Court has given you an instruction on  
16 what you need for infringement, to find it.

17                   Dr. Alexander was fully capable of doing  
18 that analysis. You know what he needed? He needed the  
19 patent, he needed the Court's construction, and then he  
20 needed to go to one of their customers and say: Tell  
21 me -- let me see how your system works. That's all he  
22 needed. He had the full opportunity.

23                   For some reason, Google didn't ask their  
24 expert to do that. And you've got to wonder why. It's  
25 because Google knows -- they know and they knew it when

1 they signed the license agreement -- just giving  
2 DoubleClick didn't infringe indirectly at all.

3           So they just disregarded it and decided:  
4 You know what? Don't look at that, Dr. Alexander.  
5 So they didn't present any evidence.

6           What did they point to?

7           They point to these documents to try to  
8 suggest to you that these suggest that we admit that  
9 there was infringement by those five partners. So they  
10 point to our complaint, our interrogatory responses, our  
11 requests for admissions, and the infringement  
12 contentions. And they say look at those, Members of the  
13 Jury. Those establish that we admit that Google's  
14 DoubleClick infringes.

15           Members of the Jury, you look at those  
16 documents. Take a careful look at them. There will be  
17 no evidence in those documents that suggest that we at  
18 any point said using DoubleClick constitutes indirect  
19 infringement by Google. Nothing in there says that.

20           Look at our response. Now, Counsel put  
21 up certain sections of our interrogatory responses and  
22 she read them. She read the first sentence: Plaintiff  
23 contends. She read the last sentence, right?

24           Look at the sentence right after the  
25 third sentence. This contention that we had at the

1 beginning, this contention is not specifically based on  
2 their use of any particular Google product or service.

3           What we told all of the Defendant -- it  
4 doesn't matter whether you use DoubleClick or some other  
5 ad tag from somebody else. That's not the basis of our  
6 contention.

7           Our contention is you're using  
8 advertising-related information. We don't care where it  
9 comes from. We're not specifically accusing anybody.  
10 That's what we told them.

11           Now, look at the request for admission.  
12 Again, Counsel read the first sentence. She read  
13 another sentence right around this area (indicating),  
14 but you know what a request for admission is. It says,  
15 Beneficial, admit this.

16           What did we do when they say admit this  
17 fact?

18           Take a look at the last sentence. The  
19 very first sentence says: Accordingly, Plaintiff  
20 denies. This request for admission ended up in a denial  
21 of the admission that they wanted us to make. We deny  
22 that its contentions are based on their product. It is  
23 not evidence of admission, Members of the Jury. It's  
24 the exact opposite. It's a denial.

25           So what do we have here?

1                   Their case boils down to this, Members of  
2 the Jury: The only thing that they pointed to, to try  
3 to get you to believe that there's direct infringement,  
4 our infringement contentions, the very big document that  
5 they say you need to look to, the Judge pointed you to  
6 the Lady of Justice, sitting -- standing right there.

7                   The Lady of Justice is important in this  
8 case, and I'll tell you why.

9                   When I started preparing for this case, I  
10 had a big concern and here was my concern: Google was  
11 bringing a case against Mr. Goldberg. No one knows  
12 Mr. Goldberg. They were accusing him of breaking  
13 promises. Google is a big company. Admittedly, Google  
14 gives us great, great products. We all may use their  
15 search. We may use their Gmail. In fact, Google gives  
16 away a lot of their products.

17                  My concern was this: There's a phrase  
18 that I use and it's called the Google halo, and I  
19 literally mean the halo. And that's that thing that  
20 hovers over Google that says we can do no wrong because  
21 we're a big company; we give away great products. My  
22 concern was, when Google and their halo brings a lawsuit  
23 against Mr. Goldberg and says, you breached their  
24 contract. That's all that's going to matter.

25                  THE COURT: Five minutes, Counsel.

1 MR. ADAMS: Thank you, Your Honor.

2 But you know why I know? I step into  
3 this courtroom many times, and I've seen the Lady of  
4 Justice. Take a look at the Lady of Justice. There's  
5 something over her eyes. Justice is blind. She does  
6 not see the halo. It never makes it into this  
7 courtroom. When we picked you as jurors, you promised  
8 you're going to base your -- your decision solely on the  
9 evidence, not on that halo. That's what you promised.  
10 And that's what we're going to hold you to.

11 Put the evidence on the scale of whether  
12 or not there's infringement. This is their evidence,  
13 our infringement contentions.

14 Well, what do we know about the other  
15 side of the scale?

16 If you want to look at what we believe at  
17 any particular time, look at what they believe. They  
18 say we believe that it constitutes direct infringement.  
19 Google doesn't believe that. So do you know what that  
20 means?

21 At best the scales are even. At best.  
22 But you know what? We've got more, because not only do  
23 they not believe, but take a look at what they say.

24 Mr. Trinh: None of the infringement  
25 contentions by themselves establishes infringement.

1 So you know what that does? We have a little bit more  
2 weight now. You can't even look at our infringement  
3 contentions just by themselves. So the scales have  
4 tipped in our favor.

5 And lastly, other than the infringement  
6 contentions, do you have any other evidence of -- of  
7 infringement?

8 Mr. Trinh says no. I'm going to put that  
9 testimony on our side as well. This is what the scales  
10 look like when you take away the halo. When you put the  
11 blind on Lady Justice, it looks like this. They have  
12 presented no evidence on direct infringement, Members of  
13 the Jury. And because of that and that fact alone,  
14 you've got to find that there's been no breach of the  
15 license agreement.

16 I don't get to speak again because they  
17 have the burden. Hold them to that burden.

18 Thank you.

19 Thank you, Your Honor.

20 THE COURT: Plaintiff has seven minutes  
21 remaining for final closing argument.

22 MS. ANDERSON: Thank you, Your Honor.

23 May I request a three-minute warning  
24 before the end?

25 THE COURT: You may.

1 MS. ANDERSON: Thank you.

2 Ladies and gentlemen, you saw a slide  
3 during Beneficial's presentation suggesting there's zero  
4 evidence, zero evidence that there is direct  
5 infringement, according to Beneficial's theory. That is  
6 not the case.

7 And when I went through the timeline with  
8 you, I showed you all the exhibits where Beneficial  
9 firmly embraced the fact that they believe that the  
10 websites of customers that were sued infringes.

11 And they used those beliefs and  
12 statements in court proceedings and used them to get  
13 settlements and then come here in this trial and pretend  
14 that they didn't say those words.

15 That is wrong. There is plenty of  
16 evidence, ladies and gentlemen. What you haven't heard  
17 is any evidence from Beneficial where they went through  
18 those and denied what they said in there. It hasn't  
19 happened.

20 They could have walked through them and  
21 said they were false and -- and denied that they had  
22 accused of infringement in just the way they said in  
23 Exhibits 8 and 9, but they didn't.

24 Also interesting, ladies and gentlemen,  
25 is they criticized Dr. Alexander so heavily in

1 examination for having relied on Beneficial's own words  
2 to prove infringement.

3           And remember, Exhibits 8 and 9, those  
4 long contentions, they go through every claim, every  
5 limitation, and prove in Beneficial's words why there's  
6 infringement of all those claims.

7           They criticized Dr. Alexander for relying  
8 on them in this case. Yet, those are documents that are  
9 signed by -- by Mr. Rosen, who examined Dr. Alexander.  
10 The same gentleman that signed them was criticizing Dr.  
11 Alexander on the stand for relying on them.

12           He also signed Exhibits 12 and 13. He is  
13 the mouthpiece for Beneficial. Came to this court,  
14 filed documents to sue customers, and Beneficial should  
15 be held to those words.

16           It's also important to know that in this  
17 case, as we saw in some of the slides in the beginning  
18 of this case -- if I could have Slide 7 up, please, Ben.  
19 Google, in the settlement agreement, was never required  
20 to admit patent infringement. That was a term of the  
21 deal. Google paid money for the licenses, got licenses  
22 for customers, and Beneficial agreed, no admission of  
23 liability for infringement. Google didn't have to do  
24 that to have the benefit of its license.

25           So for Beneficial to come and criticize

1 Google for having denied infringement in this case  
2 because customers are licensed is the height of  
3 hypocrisy. It's part of the agreement. It's right  
4 there in there.

5               So, ladies and gentlemen, we heard  
6 arguments from Beneficial suggesting that somehow Google  
7 was embarrassed, embarrassed for having paid almost  
8 \$2-1/2 million for licenses for its customers.

9               Embarrassed?

10              Ladies and gentlemen, Google fought and  
11 came to court, voluntarily put itself in this lawsuit  
12 just to prove up in a court of law that its customers  
13 were licensed and come to you and ask you to please find  
14 that there has been a broken promise here and only award  
15 \$1 of damage.

16              We just want a finding that's clear so  
17 this stops happening, so Beneficial doesn't go running  
18 out suing customers again and again, putting in long  
19 documents explaining why those customers are infringers,  
20 never excluding DoubleClick products, and then turn  
21 around settle.

22              And when called to the carpet again in a  
23 lawsuit, claim: Oh, we didn't mean anything we said; we  
24 just -- you know, didn't really happen.

25              THE COURT: Three minutes, Counsel.

1 MS. ANDERSON: Thank you, Your Honor.

2 That's wrong, ladies and gentlemen. We  
3 have a situation in this case where our customers have  
4 been sued and Google has been harmed. There was an  
5 agreement in this case, and the harm is the deprivation  
6 of the peace, the freedom from litigation, that our  
7 customers can use our products in the way licensed  
8 without fear of suit.

9 And you may note, and when you have the  
10 evidence before you in the jury room, you're going to  
11 see examples like Exhibits 31, 32, and 37 of the  
12 complaints of our customers who are saying: We've been  
13 sued for using DoubleClick. And those are complaints  
14 because they were sued in violation of the license.

15 So, ladies and gentlemen, please remember  
16 also, when you're evaluating the license provisions,  
17 that to establish indirect infringement, you can do it  
18 one of two ways. It can be inducement or contributory.  
19 And either way, those customers are licensed.

20 It's also important to remember that the  
21 evidence that you heard throughout the case establishes  
22 that Beneficial has consistently taken one position  
23 until the point at which it's not very helpful to them  
24 in this case, because they want to turn around and do it  
25 again.

1                   So, ladies and gentlemen, when you get to  
2 the jury room, you're going to have with you a verdict  
3 form, and you will be at the conclusion of your  
4 deliberations.

5                   And we're going to ask that when you fill  
6 this out and answer the question, did Beneficial breach  
7 the settlement agreement between Beneficial and Google  
8 by bringing a lawsuit against accused Google customers  
9 for infringement of the '702 and '943 patents, based on  
10 their use of Google's DoubleClick product, please  
11 answer, yes, Beneficial has breached, has broken the  
12 promise.

13                   And please find that Google is entitled  
14 to \$1 in damages so that we are not having to fight  
15 through on this again and again with Beneficial refusing  
16 to live up to their promise and dragging customers into  
17 court and settling so that they don't have to answer for  
18 what they've done.

19                   Thank you, ladies and gentlemen, so much  
20 for your time. We very much appreciate it.

21                   THE COURT: All right. That completes  
22 closing arguments from the attorneys. I now have a few  
23 final instructions for the jury before you begin your  
24 deliberations.

25                   You must perform your duty as jurors

1 without bias or prejudice as to any party. The law does  
2 not permit you to be controlled by sympathy, prejudice,  
3 or public opinion.

4 All parties expect that you will  
5 carefully and impartially consider all the evidence,  
6 follow the law as I've given it to you, and reach a just  
7 verdict, regardless of the consequences.

8 Answer each question from the facts as  
9 you find them. Do not decide who you think should win  
10 and then answer the answers accordingly.

11 Again, ladies and gentlemen, your answers  
12 and your verdict must be unanimous.

13 You should consider and decide this case  
14 as -- as a dispute between persons of equal standing in  
15 the community, of equal worth and holding the same or  
16 similar stations in life.

17 This is true in patent cases between  
18 corporations, partnerships, and individuals, and a  
19 patent owner is entitled to protect its patent rights  
20 under the United States Constitution. This includes  
21 bringing a suit in a United States District Court such  
22 as this for money damages for infringement.

23 The law recognizes no distinction between  
24 the types of parties. All corporations, partnerships,  
25 and other organizations stand equal before the law,

1 regardless of their size, who owns them, and they are to  
2 be treated as equals.

3           When you retire to the jury room to  
4 deliberate upon your verdict, you will each have a copy  
5 of this written charge to take with you.

6           If you desire to review any of the  
7 exhibits which the Court has admitted into evidence  
8 during the trial, you should advise me by a written note  
9 signed by your foreperson and delivered to the court  
10 security officer, and I will then send those exhibits or  
11 that exhibit to you.

12           Once you retire, you should first select  
13 your foreperson and then conduct your deliberations.  
14 If you recess during your deliberations, follow all the  
15 instructions the Court has given you about your conduct  
16 during the trial.

17           After you have reached your verdict, your  
18 foreperson is to fill in on the verdict form your  
19 unanimous answers to the questions, then date it and  
20 sign it.

21           Do not reveal your answers until such  
22 time as you are discharged, unless otherwise directed by  
23 me. And you must never disclose to anyone, not even me,  
24 your numerical division on any question.

25           Any notes that you have taken during this

1 trial are aids to your memory only. If your memory  
2 should differ from your notes, then you should rely on  
3 your memory and not your notes. The notes are not  
4 evidence.

5           A juror who has not taken notes should  
6 rely on his or her own independent recollection of the  
7 evidence and should not be unduly influenced by the  
8 notes of other jurors. Notes are not entitled to any  
9 greater weight than the recollection or impression of  
10 each juror about the testimony.

11           If you want to communicate with me at any  
12 time during your deliberations, please give a written  
13 message or note to the court security officer, who will  
14 bring it to me.

15           I'll then respond as promptly as possible  
16 either in writing or by having you brought back into the  
17 courtroom where I can address you orally. I will always  
18 first disclose to the attorneys your question and my  
19 response before I answer your question.

20           After you have reached a verdict and I've  
21 discharged you, you are not required to talk with anyone  
22 about this case unless the Court orders it otherwise.  
23 I'll now hand eight copies of the final instructions to  
24 the jury and one blank verdict form to the court  
25 security officer to deliver to you as you retire.

1                   Ladies and gentlemen, you may now retire  
2 to the jury room to deliberate upon and reach your  
3 verdict. We await your verdict.

4                   COURT SECURITY OFFICER: All rise.

5                   (Jury out.)

6                   THE COURT: Counsel, you are welcome to  
7 wait in the courtroom or the courthouse or elsewhere.

8                   Please make sure that my clerks have good  
9 cell phone numbers for all counsel of record so that if  
10 you're outside of the courtroom, we can call you in the  
11 event of a note or a verdict.

12                   But until such time, we stand in recess.

13                   (Jury deliberations.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/\_\_\_\_\_  
SHELLY HOLMES, CSR  
Official Court Reporter  
State of Texas No.: 7804  
Expiration Date 12/31/14

\_\_\_\_1/23/14\_\_\_\_\_  
Date

/s/\_\_\_\_\_  
SUSAN SIMMONS, CSR  
Official Court Reporter  
State of Texas No.: 267  
Expiration Date 12/31/14

\_\_\_\_1/23/14\_\_\_\_\_  
Date